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AUG 04 2003

OFFICE OF PETITIONS

In re Application of :
Staines et al. :
Application No. 09/692,722 : **ON PETITION**
Filed: 19 October, 2000 :
Attorney Docket No. 199-0850 :

This is a decision on the petition under 37 CFR 1.137(b)¹ to revive the above-identified application filed on 30 June, 2003, which is first treated as a petition under 37 CFR 1.181 to withdraw the holding of abandonment.

The petition under 37 CFR 1.181 is **DISMISSED**.

The petition under 37 CFR 1.137(b) is **GRANTED**.

¹Effective December 1, 1997, the provisions of 37 CFR 1.137(b) now provide that where the delay in reply was unintentional, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to 37 CFR 1.137(b). A grantable petition filed under the provisions of 37 CFR 1.137(b) must be accompanied by:

(1) the required reply, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In a nonprovisional application filed on or after June 8, 1995, and abandoned for failure to prosecute, the required reply may also be met by the filing of a request for continued examination in compliance with § 1.114. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof. In an application abandoned for failure to pay the publication fee, the required reply must include payment of the publication fee.

(2) the petition fee as set forth in 37 CFR 1.17(m);

(3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional. The Commissioner may require additional information where there is a question whether the delay was unintentional; and

(4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c)).

This application became abandoned on 29 March, 2001, for failure to timely submit an oath or declaration and a surcharge for its late filing in response to the Notice to File Missing Parts of Nonprovisional Application mailed on 28 December, 2000, which set a two (2) month shortened period for reply. Notice of Abandonment was mailed 15 May, 2003.

Petitioners assert that the Notice to File Missing Parts mailed on 28 December, 2000, was never received. A review of the written record indicates no irregularity in the mailing of the Notice, and in the absence of any irregularity there is a strong presumption that the Notice was properly mailed to the applicant at the address of record. This presumption may be overcome by a showing that the Notice was not in fact received. The showing required to establish non-receipt of an Office communication must include a statement from the practitioner stating that the Office communication was not received by the practitioner and attesting to the fact that a search of the file jacket and docket records indicates that the Office communication was not received. A copy of the docket record where the non-received Office communication would have been entered had it been received and docketed must be attached to and referenced in practitioner's statement.² This showing may not be sufficient if there are circumstances that point to a conclusion that the Office action may have been lost after receipt rather than a conclusion that the Office action was lost in the mail.

Although petitioners present a declaration by counsel's Patent Administrator, Saundra M. Lewis, that the Notice was never received, petitioners have not provided a statement by the practitioner stating that the Office communication was not received by the practitioner and attesting to the fact that a search of the file jacket and docket records indicates that the Office communication was not received. Petitioners have also not provided a copy of the docket record where the non-received Office communication would have been entered had it been received and docketed attached to and referenced in practitioner's statement.

As the showing of record is insufficient to merit withdrawal of the holding of abandonment, the petition under 37 CFR 1.181 is **dismissed**.

²See Withdrawing the Holding of Abandonment When Office Actions Are Not Received; Notice 1156 Off. Gaz. Pat. Office 53 (November 16, 1993).

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The petition under 37 CFR 1.137(b) is **granted**.

The application is being forwarded to the Office of Initial Patent Examination for further processing.

Telephone inquiries concerning this matter may be directed to the undersigned at (703)308-6918.

D Wood

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Office of Petitions